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In The

Supreme Court of the United States

October Term, 1975

No. 75-24

FEDERAL TRADE COMMISSION,

Respondent,

vs.

BEAUTY-STYLE MODERNIZERS, INC., a corporation and MORRIS JAKEL,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BEAUTY-STYLE MODERNIZERS, INC., a corporation and MORRIS JAKEL and SAUL JAKEL, individually and as officers of said corporation,

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OPINIONS BELOW

The initial decision of the Law Judge of the Federal Trade Commission dated August 31, 1973 appear in the appendix (at p.26a);* the final order of the Federal Trade Commission dated June 11, 1974 and appears in the appendix (55a), the judgment of the Court of Appeals for the Third Circuit was rendered on April 8, 1975 and was amended on April 22, 1975, appears in the appendix at 70a, 72a.

* Reference numbers suffixed by the letter "a" refer to Joint Appendix, filed simultaneously herewith.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered April 8, 1975 and amended April 22, 1975. The jurisdiction of this Court is invoked by 28 U.S.C., Sec. 1254(1).

INTRODUCTORY PARAGRAPH

The petition of Saul Jakel, Morris Jakel, and Beauty-Style Modernizers, Inc., a New Jersey Corporation requests a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Third Circuit, entered in this proceeding on April 8, 1975.

QUESTIONS PRESENTED

1A. Is not the Federal Trade Commission barred from issuing a punitive order?

1B. If at the time of the issuing of the order by the Federal Trade Commission, petitioner was in compliance with Regulation Z, should not the proceedings have been suspended?

2. Was petitioner deprived of due process by the fact that the Commission did not abide by its own stipulation of fact?

STATEMENT OF THE CASE

Petitioner was charged with a violation of Regulation Z of the Truth in Lending Act 15 U.S.C. §1601,et seq.; in failing to disclose certain consumer credit information in connection with

their advertising and home improvement contracts from July, 1969, through January 1970 and subsequent thereto.

Complaint was issued September 18, 1972. An Administrative hearing before the Law Judge was held in June, 1974 whose initial decision was rendered August 31, 1973 (26a). From this decision petitioners appealed to the Federal Trade Commission and a hearing was held in January, 1974 on which an order was entered June 11, 1974 by the Federal Trade Commission (55a). Petitioners appealed to the United States Court of Appeals for the Third Circuit, which on April 8, 1975 entered a judgment, as amended, on April 22, 1975, affirming the final order of the Federal Trade Commission (70a, 72a). From this judgment of the United States Court of Appeals for the Third Circuit, petitioners now petition the United States Supreme Court.

The case before the United States Court of Appeals, Third Circuit involved two broad questions:

> 1. Did the petitioners violate the Truth in Lending Act, (15 U.S.C. Sec. 1601, et seq.) and the Federal Trade Commission Act (15 U.S.C. Sec. 45(a)) in failing to disclose certain consumer credit information.
>
> 2. Whether the order of the Federal Trade Commission was too broad and not regulatory but punitive.

Petitioners, Beauty Style Modernizers, Inc., Morris Jakel and Saul Jakel, as individuals operated a home improvement

company at 432 Central Avenue, Newark, New Jersey. The individual petitioners are President and General Manager of the corporation. As part of their business, petitioners made credit transactions. On February 2, 1970, an agent of the Federal Trade Commission came to their place of business as a result of an advertisement on behalf of the petitioners in the Sunday News of December, 1969. At that time, the agent was informed that the ad had been corrected and upon reviewing the ad, the agent agreed that it was correct in its new form, and no violation existed (24a) (p.386a, line 5).

At the same time, while the agent was present, she took a copy of the contract being utilized by petitioners in their business, for review by her agency, and advised petitioners they would have to sign an affidavit assuring discontinuance of the objectionable advertising; although it is clear at that time the objectional advertising no longer existed (24a).

Thereafter, no further advertising appeared in the Daily News, but in the Sunday Star Ledger, a local New Jersey Newspaper, defective ad appeared on June 21, 1970 and July 5, 1970. The ad in the Sunday Star Ledger was not the same as the ad in the News, as set forth before, but was not in compliance. The facts show that the Sunday Star Ledger ad was prepared and placed by P & G Advertising Agency on behalf of the petitioners and went into the newspapers without petitioners knowledge.

Between February, 1970 and June, 1970, petitioners had advertised in the newspaper with the correct ad (23a).

As to the contracts, the agent for the Federal Trade Commission thereafter informed petitioners that the contracts were not in compliance with Regulation Z. A meeting was held before the institution of any complaint of the Federal Trade Commission at which time the Federal Trade Commission representatives requested petitioners to sign an affidavit to cease and desist from utilizing these contracts, which in fact, at that time, the violation had ceased both as to advertising and as to the contracts (Testimony partially stricken). Thereafter a complaint was issued on September 18, 1972 (16a-17a) (23a).

During the proceedings, a stipulation was entered into between the Federal Trade Commission and petitioners (14a-15a).

At the hearing before the Law Judge of the Federal Trade Commission the Law Judge first sustained the objection by petitioners to the entry of evidence prior to July 1, 1969, in accordance with the stipulation set forth in the appendix but thereafter, reversed himself (17a-20a).

The initial order of the Law Judge was adopted after a hearing before the Federal Trade Commission; although it is undisputed that at the time of the issuance of the order petitioners were no longer in violation and had been in compliance (66a) (23a).

However, the Federal Trade Commission adopted the initial order of the hearing officer.

This order is now presented to this Court for review.

REASONS FOR GRANTING THE WRIT

Point I A.

The cease and desist order was too broad.

The Commission after adopting the initial decision also adopted the order as set forth in the initial decision (26a). The initial decision contained the following order.

> 1. Ordering petitioner to make sure that its contracts were in compliance with Regulation Z (51a-52a) (through sub-paragraph 5) (not a quote).
>
> 2. "It is further ordered that respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person" (53a).
>
> 3. Ordering the individuals concerned to keep continuously in contact with the Commission as to their employment (not a quote).

Petitioner refers to number two set forth above and complains about the breadth of same.

Petitioner brings to the attention of the Court that as of September, 1972, all violations ceased; before the issuance of the complaint (66a).

The case of *Swanee Paper Corp. v. F.T.C.*, 291 F.2d 833 (1961), *cert. denied*, 368 U.S. 987 (1962) is apropo of this contention.

In discussing the power of the Federal Trade Commission to render an order as to a violation before it, the Court held:

> "Although the Commission's findings in section 2(d) violation is supported by the record, the breadth of the order issued is not justified by the facts. Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future. . . ."
>
> "Nothing in the record here indicates flagrant or extensive violations of section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed. Moreover, the order is not even limited to related activities but enjoins Swanee from violating Sec. 2(d) in the very words of the Statute."

And further the Court stated:

> "It is true that Swanee did not object to the order during the proceedings below and that orderly appellate review of administrative decisions usually requires that such objection be made. . . ."
>
> "Swanee did object to the order however in its petition to review and at the time this was filed the Commission could have modified its order if it had so wished."

And this view of the modification of the order is upheld in the case of *Federal Trade Commission v. Broch*, 368 U.S. 360 (1961).

Furthermore, the jurisdiction of the Federal Trade Commission must exist at the time of the making of the order. This order must be regulatory and not punitive, as set forth in the *United Corp., et al. v. Federal Trade Commission*, 4th Circuit Court of Appeals March 11, 1940, 110 F.2d 473.

In order for an order of the Commission to be regulatory, it must have something to regulate and furthermore, said regulation must be reasonably related between the facts found and the breadth of the order.

In the instant case, there was nothing regulatory insofar as the transition period is concerned because it had long expired before the order of the Commission and in fact, no regulatory order was made as to the transition period.

This also was no longer in violation at the time of the making of the order as we have seen, and no propensity was shown between June, 1970, the date of the last inadvertent advertising in the Star Ledger of New Jersey and the time of the order in 1973. There was therefore nothing to regulate insofar as the advertising existed at the time of the hearing of the Law Judge and there was no reasonable likelihood for the repetition of said advertising.

Insofar as contracts in use in 1973, and used since 1971, no issue arose for any propensity show that petitioners were continuing to use the old 1970 contracts which in fact, they were not. Therefore, there was nothing to regulate insofar as the entire business of the petitioner at the time of the making of the order in 1973.

It was for this reason petitioners refused to sign the affidavit offered to him by the Federal Trade Commission investigators because there was an insinuation that petitioner was continuing the bad practice while in fact, petitioner was not (37a).

Now, if there was nothing to regulate, the order should have contained no other provisions. But in fact, they contained punitive conditions.

In relation to the time span, pertinent to this type of Commission order, the Court's attention is brought to the *Federal Trade Commission v. National Lead Company*, 1955 (CCA7), 352 U.S. 419 (1957); in which it was stated:

> "At the beginning we must understand the limits of the contested portion of the order. First,

> it is temporary, though its life expectancy is not definite, it is clear that the commission was creating a breathing spell . . . . "

But the order of the Commission in the instant case is a lifetime sentence.

But the Commission in the instant case goes further and the order is without time limits to the individuals and corporation petitioner and petitioner brings to the Court's attention that being a small business, what may be regulatory to some businesses can be punitive to others.

The punitive portions of this order are as follows:

> Furthermore, the importance of the order is the fact that any future violation may well lead to criminal sanctions since the act has a criminal section as to any knowing violation (15 U.S.C.A. Sec. 1611).

Paragraph two of this order mandates that a copy of it be given to all present and future personnel engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising.

Does this mean that petitioner will have to give a copy of the order to bank officers, negotiating credit on their behalf, if so which officers does it include secretaries, clerks or supervisors.

Does it include attorneys involved in enforcing consumer contracts on their behalf.

It does not state employees, only of petitioner. It is far broader than the violation complained of in this instance.

Petitioner brings to the attention of the court that no complaints have ever been made as to consumer fraud.

It is only through a hearing in this Court that petitioners can obtain redress to avoid the punitive order which is in effect and not reasonably related to the violation alleged in the complaint and remains a lifetime sentence on petitioner in all of their future business activities.

This order makes the requirement that petitioner secure a signed receipt from persons engaged in the consummation of any extension of consumer credit or any aspect of preparation, creation or placing of advertising, from any future personnel. What right does petitioner have to insist upon such a signed statement; this is unenforcible.

Does the order intend to bind the future personnel of petitioner no matter *whomsoever* they may be. Petitioner envisions the following problem:

> (a) A freelance salesman brings in a customer for the purchase of home improvements having already sold the "job." Does he get a copy of the cease and desist order.

(b) A telephone solicitor making inquiries as to sales which eventually culminate in a consumer credit transaction is involved, even though not employed directly by petitioner.

(c) A banking officer involved in discounting the transaction thereby obviously engaged in extending credit on behalf of petitioner for whom repair job, but employed by others; does he get a copy of the order.

(d) What about the person involved intermediately with the extension of credit, who seeks information from petitioner for direction to a financing agency, etc.

Petitioner is further ordered to notify the Commission of his discontinuance of business, together with a history of his new business or new employment detailed as to duty and responsibility. How is this regulatory? When does it stop? How does it serve the public welfare?

The order in its third paragraph is even worse:

> IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the

> corporation which may affect compliance obligations arising out of the order.

Is petitioner to be restricted from selling his business or interest in his business. Is petitioner to guess what corporate changes may effect compliance obligations. Even a jail sentence comes to an end. The maintenance of this order will effectively put petitioner out of business and not regulate, as the commission euphemistically states is the purpose of its order.

Not only is the order unenforcible, but it is punitive in that the good name of petitioner in a business which petitioner has been operating without any prior commission problems for many years.

Point I B.

The Commission's order is punitive.

The power of the Federal Trade Commission is purely regulatory and not punitive *(United Corporation, et al. v. Federal Trade Commission,* Cir. Ct. of Appeals 4th Circuit, March 11, 1940, 110 Fed. 2nd 473).

Petitioner claims that the order of the Commission must not only be reasonably related to the violation it seeks to correct, but to the business involved in said regulation.

Thus an order regulating General Motors or some other large entity certainly could not apply to a small business concern, even though in the shape of a regulation.

In other words, petitioner claims that the Federal Trade Commission's regulatory function has been abused because

instead of regulating the petitioner, it will effectively put petitioner out of business. This, therefore becomes punishment and not regulation since as we have seen, there was no violation to regulate at the time of the issuance of the order by the Commission.

While it is true that a good deal of this attack relies in semantics, this Court has been previously involved with the importance of semantics. Thus in the *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 611, Court 693, 85 Lawyers Edition 930 dated March 3, 1941, in concerning itself with the wording of an order the Court approved, a cease and desist order which would contain the following:

> "Will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

And in the case of *Regal Knit Ware Corp. v. National Labor Relations Board*, 24 U.S. 965 Supreme Court, 478, 89 Lawyers Edition, 661, January 29, 1945. This Court concerned itself with the meaning of the words "successors and assigns" and their importance.

In the cease and desist order, adopted and approved by the Federal Trade Commission was the order of the Law Judge.

The order first sets forth specific numbers, 1 through 6(v) which in effect relate back to the alleged violations of January, 1970 through June, 1970.

The next paragraph further orders that a copy (petitioner assumes a written copy of this order) be given to all present and

future personnel, engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising (53a).

Petitioner notes that consumer credit and advertisement or previously defined by the Commission as being that consumer credit and advertisement defined by the regulation in the Truth in Lending Act (51a).

So that in addition to the specificly numbered items set forth in the order, this paragraph of the regulatory order demands that petitioner: first give a copy to all future and present personnel, but to which personnel is undefineable; especially when the order places personnel equally with the definition of those engaged in the broadest meaning of extension of credit advertising transactions.

It is harmful to petitioner and not regulatory to require it to give a copy of this order to bank officers, who are engaged within the broadest meaning of the extension of consumer credit in relation to transactions in which petitioner is involved.

It is harmful to petitioner and not regulatory if the meaning of personnel includes secretaries, attorneys, newspaper personnel, etc. and furthermore, the order states that petitioners must secure a signed statement from these personnel.

Is petitioner to fire a salesman who refuses to sign such a statement or is petitioner to be automatically in contempt if he does not receive a signed statement. Is this not clearly beyond regulation. Does this not clearly become an unenforcible order.

The order goes further and now separates the individual petitioner as to their future activities. It is to be noted that this part of the order has no qualification as to time or scope. It clearly sets forth that the individual petitioner continually and forever notify the Commission of their employment or business, together with a description of their duties and responsibilities no matter what and where they may occur (53a).

So, that if petitioner, individually, obtained a high governmental security job, he would be automatically in contempt by not giving a description of his duties and responsibilities; or he would be unauthorized to take the job which would be a restriction on his ability to work. While this may seem far fetched, it is no more far fetched than the breadth and scope of this order. This portion of the order in effect puts petitioner on probation, without stating so in so many words, which is beyond the scope and power of the Federal Trade Commission. The last paragraph of the order becomes more punitive in its final paragraphs, and now refers back to all the petitioners (which includes the corporation) which require a 30 day notice prior to any changes, sale, successors of the corporation or of the stock interest in the corporation which "may effect compliance obligation arising out of the order."

Is petitioner to be saddled with the question of whether a sale of the corporation to a third party presently not a party to this action and therefore not bound by this order, will effect the compliance obligation. Does this mean petitioner will be responsible for the successors actions. Does this mean petitioner might be ordered by the Commission to inform any proposed purchaser or transferee of this cease and desist order although

said party is not presently a part of such order? Does this mean that a successor in interest will be held to this final order of the Law Judge?

For all of these reasons petitioner claims this order is punitive and should only contain the words as set forth in the *National Labor Relations Board v. Express Publishing Co., infra:*

> "Will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

Especially in view of the fact that this Court may very well consider the time element of more than 3 years to the final order as to the violation involved *(Dienors Inc. v. Federal Trade Commission,* 449 Fed. 2d, 432, March 22, 1947). This Court may very well find the lapse of time too great, for more than a limited order; which will truly regulate and not punish.

Point II.

Petitioner was deprived of due process by respondent by the fact that the Federal Trade Commission did not abide by its own stipulations.

Petitioner complains that the Federal Trade Commission (hereinafter called the Commission) did not adhere to its own rules (Rule 3.21 F.T.C. Rules of Practice). Specifically the Commission did not comply with the agreed statement of issues entered into between the parties (14a). It is clear that the Commission attempted to find justification in the hearing officer's initial decision sustaining and rationalizing it.

The order of the Commission indicates that there are three issues (59a).

The Commission does more, it names by title the three issues (60a).

Petitioner has no argument with the findings by the Commission that the first issue deals with the transition period. That the second issue deals with the time period commencing July 1, 1969 and the Third issue deals with advertisements.

However, the Commission sustained the hearing judge's failure to be limited by the time period set forth in issue number two.

It is clear that the second issue covers the period July 1, 1969 to December 31, 1969, as follows:

> "Whether the retail installment contract forms as altered for the period July 1, 1969 to December 31, 1969 complied with the requirements of Regulation Z" (59a).

It is clear that the second issue concerns the forms of contracts during this period.

It is clear that the first issue concerns the transition period which is known as a grace period and it is divided into two parts, to wit, bona fide steps and use of existing contracts.

But the Commission further states as to the second issue:

> "On the second of these stipulated issues, the law judge rules that the altered forms utilized by *respondents subsequent to July 1, 1969* were not in conformance with the specific disclosure requirements of the Act, which he held mandatory" (emphasis ours).

But this is not the wording of the agreed issues.

So that in fact, the Commission is extending the second issue from its time period of July 1, 1969 and ending December 31, 1969.

No other period should have been the subject of this Commission's deliberation; as was argued strenuously before the hearing officer (18a-19a).

The Commission found that the contract after July 1, 1969 was not in compliance with Regulation Z without putting any termination date as stipulated.

The result of this contortion of reason is that the Commission and hearing officer concerned themselves with contracts not only from July 1, 1969 to December 31, 1969 as set forth in issue number two of the stipulation but with contracts after December 31, 1969 and in fact without a termination date.

The practical result is that petitioner had no way to defend itself against a vague complaint and trial extending beyond the stipulated issues.

Especially is this so when the hearing Law Judge at the outset of the hearing on June 5, 1973 stated:

> "Now, at the pre-hearing conference that was held on April 10th, certain stipulations were reached as a result of which, if I understand correctly, complaint counsel has rested, and this hearing was fixed for the purpose of receiving the evidence on behalf of the respondents from Mr. Gelber".

But it seems that stipulation was only binding on petitioner and not on complaint counsel or the Commission. Because as stated previously, the Law Judge went beyond the period set forth in this stipulation.

CONCLUSION

Petitioners therefore urge the following conclusions for the reasons stated:

1. The order of the Federal Trade Commission is a restriction on the personal liberty of the individual petitioners without any limitation as to time or scope and is therefore an abuse of power.

2. The order of the Federal Trade Commission is punitive and not regulatory and therefore beyond the statutory power of the Federal Trade Commission.

3. The order of the Federal Trade Commission should be modified to meet the violation which had ceased at the time of the order.

4. The order of the Federal Trade Commission is a product of a hearing which deprived petitioners of due process by the non-adherence of the Law Judge to the stipulations filed in this matter.

Respectfully submitted,

s/ Martin Gelber
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